United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7159

B

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

against

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

BRIEF OF AMICUS CURIAE
New York State Bar Association

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Normally a lawyer may not reveal a confidence without consent of

Amicus Curiae Brief

of the

New York State Bar Association

This Court has requested amicus curiae briefs from four bar associations including the New York State Bar Association. The District Court disqualified attorneys for several defendants and its order has been appealed. The appeal involves interpretation of the Code of Professional Responsibility, and particularly Canons 4 and 5 of the Code.

We are pleased that the Court suggested our participation in making available materials and views for its consideration. Difficult issues with respect to the Code of Professional Responsibility are arising more and more frequently. In part this may reflect the complexity of modern business transactions. We hope that in part it reflects a somewhat greater awareness of the importance of high ethical standards of professional conduct. The New York State Bar Association has done a great deal to emphasize the importance of the Code of Professional Responsibility* in maintaining high professional standards.

Issues Presented

The central issue is whether any member of the firm of Apter, Nahum & Lenge may represent Julius Apter and other defendants in a case involving charges of misrepresnetation and fraud in the sale of shares of a company. We consider in Part I below the provisions of

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* Hereinafter sometimes referred to as the Code.

Canon 5 and related provisions of the Code as applied to the disqualification of counsel if Julius Apter is treated as being in the same position as a partner in the law firm. Part II considers whether the retirement of Julius Apter should change the result that would be reached if he were still a partner. Part III considers the questions, largely arising under Canon 4, presented by the fact that one of the plaintiff's is the suriving corporation in a merger and is thus a successor to the Apter firm's former corporate client.

I

Except where the interest of justice require otherwise, a witness to significant matters should not act as trial lawyer for any party.

A. The general rule.

DR 5-101(B) and DR 5-102 state the proposition that in general a lawyer may not be both trial counsel and a significant witness.[1/] DR 5-101(B) directs a lawyer not to accept employment in pending litigation if it is obvious that a lawyer in his firm ought to be called as a witness. There are exceptions if the testimony will relate solely to an uncontested matter or will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition.[2/]

Many reasons for the rule have been given. The reasons have been analyzed in Professor Sutton's article in 41 Texas Law Review

1/ See Appendix A for the text of all relevant provisions of the Code of Professional Responsibility, both ethical considerations and disciplinary rules.

2/ DR 5-101(B)(1) and (2). DR 5-101(B)(3) concerns testimony that will relate solely to the value of legal services, and DR 5-101(B)(4), the hardship exception, is discussed under I(B) of this brief.

477 (1963), written with respect to earlier canons of professional ethics.[3/] They were also analyzed by Wigmore in 6 Wigmore, Evidence Sec. 1911, 595-606 (3d ed. 1940). EC 5-9 refers to a choice a lawyer may have whether to be a witness or an advocate. One reason it gives for not being both is that the lawyer-witness is more easily impeachable and thus may be a less effective witness. On the other hand, it may be unfair because opposing counsel may be handicapped in challenging the credibility of the lawyer as witness. Some commentators have suggested that a jury may give undue weight to a lawyer's testimony. EC 5-9 also states that it is unseemly for an advocate to argue in favor of his own credibility. Finally the role of the lawyer as an advocate and the role of a witness are basically inconsistent. The witness is supposed to give impartial assistance in arriving at the facts whereas the advocate in our adversary system of justice is supposed to present all matters in the most favorable light for his client. Certainly a primary purpose of the rule was to foster confidence in the judicial process on the part of the public and to avoid the appearance of impropriety of having a lawyer seek to further his client's case by testimony on behalf of his client. Any suspicion by the public that a lawyer-witness might distort the truth in his testimony to favor his client will bring disrespect of the profession and lack of confidence in the fairness of judicial proceedings. Cf., EC 9-6 and particularly the final clause thereof.

In the case at Bar, it seems to be agreed by the parties that

3/ American Bar Association, Opinions of the Committee on Professional Ethics, including Canons of Professional Ethics, Canon 19, at 63 (1967). (Canon adopted Aug. 27, 1908; replaced by the present Canon 5 of the Code of Professional Responsibility adopted by the American Bar Association August 12, 1969).

the testimony of Julius Apter will be significant and controversial. Brief for Appellants, at 9, Brief of Plaintiffs-Appellees, at 5. Except for the issues discussed in I(B) and in II below, it is clear that neither Julius Apter nor his firm should act as trial counsel in this case.[4/]

We do not think this case presents the issue that can arise when a lawyer is called as a witness by the other side. Cf., DR 5-102(B). Counsel should not be able to disqualify opposing counsel merely by threatening to call him as a witness. In this case Julius Apter's testimony seems to be vital to the defendants, even if he is also called as a witness by plaintiffs.

B. The exception to prevent hardship on the client.

DR 5-101(B) provides that a lawyer should not accept employment if he knows that he ought to be called as a witness except that he may undertake the employment "(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

EC 5-10 reads in part:

> "In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a

4/ The Court may be interested that the Tax Division of the Department of Justice has adopted a policy under which the Government will move to disqualify opposing counsel where such counsel, or a member of his firm is likely to testify contrary to DR 5-101(B) and DR 5-102. This was set forth in a staff memorandum of the Tax Division reported by B. Kanter, Shop Talk, Vol. 42, Journal of Taxation, page 382 (June 1975).

opposition to the testimony. (3) If the testimony will

witness.[12] In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment.[13] Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.[14]*

* The above Code footnotes read as follows:

"12. 'It is the general rule that a lawyer not not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and it is necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interest, it is not only proper but mandatory that it be forthcoming.' Schwartz v. Wenger, 267 Minn. 40, 43-44, 124 N.W. 2d 489, 492 (1963)."

"13. 'The great weight of authority in this country holds that the attorney who acts as counsel and witness, in behalf of his client, in the same cause on a material matter, not of a merely formal character, and not in an emergency, but having knowledge that he would be required to be a witness in ample time to have secured other counsel and given up his service in the case, violates a highly important provision of the Code of Ethics and a rule of professional conduct, but does not commit a legal error in so testifying, as a result of which a new trial will be granted. Erwin M.Jennings Co. v. DiGenova, 107 Conn, 491,499, 141A. 866, 869 (1928)."

"14. '[C]ases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. In such a case it would be a vicious professional sentiment which would deprive the client of the benefit of his attorney's testimony.' Connolly v. Straw, 53 Wis. 645, 649, 11 N.W. 17, 19 (1881)."

"But see Canon 19: 'Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.'"

Neither the Disciplinary Rule nor the Ethical Consideration makes entirely clear the nature of the "hardship on the client" or the meaning of "the distinctive value of the ... firm" included in the exception. A key or important witness will frequently have more knowledge of the matters about which he will testify than other counsel. This alone should not justify his retention as counsel. Often the hardship might arise from an unanticipated need for the lawyer's testimony at a late stage in the proceeding when withdrawal would injure the client's position. Cf. Schwartz v. Wenger, 267 Minn. 40, 43-44, 124 N.W. 2d 489, 492 (1963). In the present case the issue arising from the fact that Julius Apter will be a witness was raised early in the litigation. Cf. Kenosha Auto Transport Corp. v. U,S., No. 851-71 (Ct. Cl. April 25, 1975).

The ABA Committee on Professional Ethics has recently considered problems arising when a lawyer or a lawyer in his firm ought to testify on behalf of the client. ABA Formal Opinion 339 (1974), published in February 1975, 61 Am. Bar Assn. J. 245, reproduced as Appendix C to this brief. That opinion stated:

> "Under the code the critical question is whether the distinctive and particular value to the client of that lawyer or that law firm as trial counsel in that particular case is so great that withdrawal would work a substantial personal or financial hardship upon the client."

Similarly in ABA Formal Opinion 220 (1967) it is said:

> "A distinction may often properly be drawn in cases where a partner's testimony relates to matters occurring in the course of his professional duties, and also in cases where the lawyer has long and intimate familiarity with the details of the matter in litigation, so that his withdrawal will necessarily deprive his client of knowledge and experience of peculiar and irreplaceable value."

ABA Formal Opinion 339 (1974) concluded:

> "Any doubt about the answer to the ethical question,

whether it arises when employment is tendered or after representation has been undertaken, should be resolved in favor of the lawyer's testifying and against his becoming or continuing as counsel. Ethical Consideration 5-10."

Julius Apter does not propose to act as counsel in this case. Any counsel for the defendants would seem to be in a position to avail himself of the detailed knowledge of Julius Apter concerning the transaction. Probably Morris Apter, Arnold F. Buchman, and the firm of Apter, Nahum & Lenge have some knowledge of the background which it would take new counsel some time to acquire. However, on the basis of the facts presented in the Joint Appendix, we do not consider that the defendants have demonstrated that this is an "exceptional situation" referred to in EC 5-10. We think the burden should be on the defendants to make such a showing. Cf., Draganesch v. First National Bank of Hollywood, 502 F 2d 550 (5th Cir. 1974) (Removal of plaintiffs' lawyer would not work a substantial hardship on plaintiffs, who were Romanian nationals and residents, by reason of counsel's knowledge of the Romanian language.)

In any event doubt should be resolved against the continuation as advocate of the partners of an important witness. Cf., Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 70 Civ. 4128 (Memorandum and Order of Pierce, J., S.D.N.Y. Oct. 29, 1973) at 12-14.

C. The time when withdrawal should be required.

The trial court did not require Julius Apter or his firm immediately to withdraw from participation in the case. It ordered that they should not participate in the trial.[5/]

5/ One of the nine defendants, J. Kevin Folely, has apparently asked for a jury trial. Joint Appendix at 4. Trial by jury emphasizes the importance of applying Canon 5.

This seems to us an appropriate balance of the interests of the parties and implementation of the disciplinary rules if the Apter firm is to be disqualified by the court.[6/]

It is true that Disciplinary Rule 5-101(B) states that a lawyer "shall not accept employment" in litigation where he knows that he will be a significant witness.[7/] It is also true that Rule 2(f)[8/] of the District Court accepts as binding on the court the Code of Professional Responsibility adopted by the American Bar Association. However, DR 5-102(A) speaks of having the lawyer "withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial." In the context of this case, if the defendants think it in their interest (and perhaps as avoiding a substantial hardship on them within the meaning of exception (4)) to have the Apter firm represent them prior to trial even though they know it cannot represent them at the trial, it seems to us appropriate to permit them to do so. This interpretation of the disciplinary rules and of the enforcement thereof by the trial court is an appropriate balance of the interests of the parties and of the requirements of impartial trials and avoiding the appearance of impropriety. It responds to the chief concern of Canon 5 by requiring separate counsel to present the matter to the jury at the trial.

6/ This may be similar to the balance struck by Judge Pierce in the Harlem River Consumers Cooperative case, supra, at 18, 19.

7/ Perhaps there is some ambiguity as to "employment in ... pending litigation" in relation to legal activities prior to trial.

8/ The rules of the District Courts within the Second Circuit are outlined in Appendix B to this brief.

II

If Julius Apter is not a member of a firm and is not acting as a lawyer for himself or for any other defendants, Canon 5 does not require the Apter firm to withdraw.

Julius Apter has filed an affidavit stating that he has retired and ceased to practive law (Joint Appendix at 5). Retirement is sometimes an ambiguous term. If, however, he wholly ceased to practice law prior to the trial of the present action, we think the rules of Canon 5 do not apply to him or to the Apter firm.[9/] The mere fact that he was an active participant as a lawyer as well as a party in the transaction under controversy should not bar his former partners from representing him and other defendants in litigation arising out of the transaction.

The most difficult questions facing the court are those that seem to be without precedent. If Julius Apter were still a partner of the law firm of Apter, Nahum & Lenge, we think there should be little difficulty in concluding as the trial judge did that the firm and its partners and associates[10/] should not act as counsel at the trial when Julius Apter will probably be an important and perhaps key witness at the trial. It is clear that if a lawyer should decline employment under DR 5-101 or should withdraw under

9/ There is some ambiguity in the briefs of the parties as to the precise date of the retirement of Julius Apter. Cf. Brief for Appellant at 3, with Brief of Plaintiffs-Appellees, n. at 27. They seem to be agreed, however, that he retired during 1974.

10/ If it is improper for one member or associate of a law firm to represent a client in a particular matter, it is improper for all other members and associates of that firm to represent that client. N.Y. State 254 (1972); N.Y. State 257 (1972); N.Y. State 392 (1975); ABA Formal Opinion 185 (1938).

DR 5-102(A), his firm cannot accept employment or continue to act at the trial. 11/

On the other hand, if, as Julius Apter's affidavit states, he ceased to practice law in January 1974, does not intend to resume practice, does not participate in the legal activities of the firm, and has no office with the firm, he would not be considered a partner of the firm in the usual sense. Even if he is entitled to some pay-out with respect to accrued earnings of the firm prior to January 1974, if he has in fact wholly ceased to practice law, he probably should not be considered a partner within the meaning of Canon 5 of the Code of Professional Responsibility. 11a/

A respectable argument can be made that there may be an appearance of impropriety within the meaning of Canon 9 in permitting a law firm to try a case in which a former partner will be an important or even principal witness. However, it is clear that a witness who has ceased to practice law is not acting in the dual capacity of witness and lawyer. There is a policy in favor of permitting parties to choose their own counsel whenever possible under the Code. Though the issue is a close one (especially where the witness participated in the transaction in question as a lawyer

11/ American jurisprudence has been vexed by the problem of applying the witness-counsel rule to the partners of the witness. The first position, as enunciated in Erwin M. Jennings, Co. v. Di Genova, 107 Conn. 491, 141A, 866 (Conn. 1928), and as approved by Wigmore in Wigmore Sec 1911, at 599, supra, and by the American Bar Association in Formal Opinions 33 (1931), 50 (1931) and 185 (1938), holds the witness-counsel and his partners and associates are for this purpose in the same position. This position was modified or changed in ABA Formal Opinion 220 (1941). However, the Canons of the American Bar Association recently adopted reinstate the old position. There are those who urge that the rules under Canon 5 should be changed to permit partners and associates to act as trial counsel where a member of the firm is a witness if the witness scrupulously avoids participation as a lawyer in the trial. The present rule clearly excludes partners and associates from acting as trial counsel if any partner or associate is disqualified. See DR 5-105(D)

11a/ In connection with confidences or conflicts, a former partner may be as disqualified as an existing one. N.Y. State 159 (1970).

and at a time when he was a partner of the law firm that will act as trial counsel) nonetheless we conclude that the better interpretation of Canon 5 would not prevent former partners and associates from acting as trial counsel in a case where their former partner, who has ceased to practice law, will be an important witness.

The record is somewnat unclear as to the exact status of Julius Apter. The motion of the plaintiffs and an affidavit in support of the motion both state that Julius Apter is a partner of the firm of Apter, Nahum & Lenge. On the other hand, Julius Apter's affidavit of October 10, 1974 set forth in the Appendix at page 5, though perhaps equivocal in some respects, flatly states that he ceased practice in January 1974. Plaintiff-Appellee's brief states at page 27 that Julius Apter was held out to the public as a partner for a considerable period after January 1974.[12/] There is little doubt that he has a financial interest in the cross-claim of the Apter firm for services performed in 1973 and prior, but we view this as immaterial and no more ground for disqualification than the interest he has in any event as a party defendant. It is possible that this court would prefer to have the District Court ascertain with greater exactitude the status of Julius Apter. In general the District judge treated him as subject to the same disabilities as a partner though the District judge's memorandum made reference to the fact that he "is or was" a member of the firm.

12/ Perhaps the note on page 27 of plaintiffs' brief in this Court may concede that he withdrew in October 1974 and is not now a partner.

In this case, there seems to be no doubt that retirement and cessation of legal practice by Julius Apter are genuine and not merely colorable. A different case would be presented if there were significant doubt about the bona fides of the retirement.

It may be noted that no question is raised with respect to the right of a person to act as his own counsel. Neither the plaintiffs nor the defendants suggest that Julius Apter is acting as his own counsel or as counsel for any other defendant.

III

The Issue Under Canon 4

This court has had recent occasion to examine in detail the obligations imposed upon lawyers relating to confidences and secrets of clients under Canon 4 and the related obligations of Canon 9. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation and Chrysler Realty Corporation, No. 74-1104 (2d Cir. May 23, 1975) (slip op. 3669); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Hull v. Celanese Corporation, No. 74-2126 (2d Cir. Mar. 26, 1975) (slip op. 2539); Cermaco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). See also United States v. Standard Oil Company, 136 F. Supp 345 (S.D.N.Y. 1955); T.C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

We fully agree with the general principles enunciated in these cases, especially with the obligation as set forth by Chief Judge Kaufman that a court must protect its own process. In Emle Industries, Inc. v. Patentex, Inc., supra, 478 F. 2d at 575, this court said:

"... the Code, like its predecessor the Canons of Professional Ethics, 'set[s] up a high moral standard, akin to that applicable to a fiduciary. ... Without firm judicial support, the Canons of Ethics would be only reverberating generalities." Empire Linotype School v. United States, 143 F. Supp. 627, 633 (S.D.N.Y. 1956). ...These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process."

Since the trial court disposed of the matter under Canon 5, it apparently was not necessary to reach issues under Canon 4. Nevertheless, if the Apter firm had the opportunity to enjoy the confidences and secrets of its client, The Electro Motive Manufacturing Company, Incorporated, we think that ordinarily it would not be permitted to be in a position to use such confidences or secrets in litigation against or brought by its former client. See Silver Chrysler Plymouth, supra, at 3674 and 3675 of the slip decision. For this purpose we view the successor by merger, Electro Motive Corporation, as standing in the shoes of the former client in most matters.

In this instance, as far as can be judged from an incomplete record, because the issues were not fully explored below, the Apter firm would not be attacking its former client. In form the Apter firm would be representing certain defendants in a suit brought by two corporations one of which is the successor by merger to Apter's former corporate client. However, that plaintiff seems to be a nominal plaintiff only, and the Apter firm would be defending representations made by the corporate predecessor of that plaintiff, its former client.[13/]

13/ Some of the services covered by the Apter firm's counter-claim seem to have been rendered after the merger and thus after its former client ceased to exist. We think this work related to the consummation of the merger and did not make the surviving corporation the client of the Apter firm within the meaning of the Code rules.

The transaction giving rise to the suit involves the "sale of the stock of the former Electro Motive Manufacturing Company, Incorporated" (Joint Appendix, page 2). The "sale" was to be effected by merging that company into a subsidiary of the other plaintiff, International Electronics Corporation. The surviving corporation in the merger changed its name to Electro Motive Corporation (Joint Appendix page 14).

In the Agreement and Plan of Merger, the company that was the client of the Apter firm made certain representations (Joint Appendix page 20). Apparently the substance of plaintiffs' allegations of misrepresentation by the individual defendants are based upon the written representations of the company (Joint Appendix page 15, 16 and 17). One of the provisions of the Agreement created an escrow fund for the benefit of indemnified parties, including the surviving corporation in the merger (Joint Appendix page 43). For claims made under the Agreement, recovery was limited to the escrow fund (Joint Appendix page 43).

We think the Apter firm could not use confidences or secrets obtained from its corporate client in a suit in which it represented a third party suing to recover from its successor by merger. See N.Y. State 395 (1975); cf. ABA Informal 516 (1962). Of course, "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment" EC 4-6. However, in the circumstances of this case, the Apter firm will be called upon to defend -- not attack -- the representations and actions of its former client. It would not be using the "confidence or secret of his client to the disadvantage of the client" within the meaning of DR 4-101(B)(2). It would not

be "detrimental to the client" within the meaning of DR 4-101(A). Normally a lawyer may not reveal a confidence without consent of the client, DR 4-101(B)(1) and (C)(1); but here the client has disapproved in the merger.

A substantial argument can be made that the Apter firm may defend itself and its former partner against charges of fraud and wrongdoing. In such defense DR 4-101(C)(4) allows the use of confidences or secrets of the former client. It may be noted that the same provision of the disciplinary rules permits a lawyer to use confidences or secrets necessary to establish or collect his fee. This provision may be relevant in connection with the counterclaim of the Apter firm.

Of course, a lawyer should "strive to avoid not only professional impropriety but also the appearance of impropriety" EC 9-6. Courts should be zealous in insisting upon high standards of professional conduct.

The resolution of the issue is not perfectly clear. However, we think Electro Motive Corporation is a nominal plaintiff. Under these circumstances, we think the Apter firm should be entitled to represent defendants who support the representations of the company which was its former client.

Since this issue was not fully explored by the trial court, this Court may desire more complete facts and perhaps findings. On the basis of the present record, we think the Apter firm should not be disqualified on this ground.

Respectfully submitted,
NEW YORK STATE BAR ASSOCIATION

Dated: August 26, 1975

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APPENDIX A

Certain Provisions of the Code of Professional Responsibility

EC 4-5

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure."

EC 4-6

"The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

DR 4-101(A)

"'Confidence'refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

DR 4-101(B)

"Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

DR 4-101(C)

"A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

EC 5-9

"Occasionally a lawyer is called upon to decide in a particular

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case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

EC 5-10

"Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

DR 5-101

"Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment. - (A) Except with the consent of his client after full disclosure, a lawyer should not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests. (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify: (1) If the testimony will relate solely to an uncontested matter. (2) If the testimony will relate solely

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to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client. (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

DR 5-102

"Withdrawal as Counsel When the Lawyers Becomes a Witness - (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4). (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

DR 5-105 (D)

American Bar Association Code of Professional Responsibility -

"If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

New York State Bar Association Code of Professional Responsibility -

"If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

EC 9-6

"Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect,

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and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."

APPENDIX B

Applicability of the ABA Code of Professional Responsibility

Federal courts receive rule-making power from two sources. The first is statutory, 28 U.S.C. § 2071:

> "Rule-Making Power Generally.
> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Under this statute district courts in the Second Circuit have promulgated the following rules concerning the discipline of attorneys:

(1) Connecticut

> Rule 2. Admission and Disbarment of Attorneys.
>
> * * *
>
> (f) Professional Ethics. This court recognizes the authority of the "Code of Professional Responsibility of the American Bar Association" (as approved by the Judges of the Connecticut Superior Court as expressing the standards of professional conduct expected of lawyers).

(2) New York (S.D., E.D., N.D.)

> Rule 5. Discipline of Attorneys
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> * * *
>
> (f) Any member of the bar of this court who is guilty of fraud; deceit; malpractice; conduct prejudicial to the administration of justice; conduct violative of the Code of Professional Responsibility of the American Bar Association or the Canons of Ethics of the New York State Bar Association; or any other conduct unbecoming a member of the bar of this court; may be disbarred, suspended or censured.

(3) Vermont

> No rule.

The second source seems to be equitable, flowing from the inherent power of courts to mould their processes. Thus in Centracchio v. Garrity, 198 F.2d 382, at 386 (1st Cir. 1952), cert. denied, 344 U.S. 866, Judge Magruder noted that the propriety of a district court order directing the U.S. attorney to return evidence wrongfully taken from a criminal defendant "depends upon considerations of an equitable nature." Judge Magruder finds "jurisdiction" for the court to do so in "the inherent power of the court to discipline an officer of the court."

In Ceramco, Inc. v. Lee Pharmaceuticals, 510 F (2d) 268 (2d Cir. 1975), this Court said at page 270:

> "The district court was incorrected in its view that the various bar associations constitute the only proper forum for investigation of a claim of professional misconduct. On the contrary, the courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries".

In the case at bar, Judge Blumenfeld relies on both statute (Rule 2(f) of the Connecticut District Court) and "the court's inherent power to assure compliance with the prophylactic rules of ethical conduct." General Motors Corporation v. City of New York, 501 F.2d 639 (2d Cir. 1974) at p. 643, n. 11 (per Kaufman, Ch. J.).*

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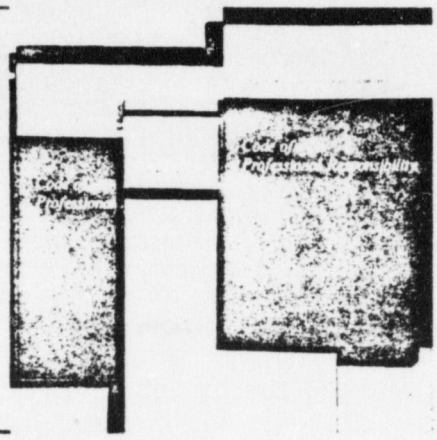
* Joint Appendix at 53.

APPENDIX C

Professional Ethics Opinions



Formal Opinion 339

(November 16, 1974)

Ordinarily a lawyer should withdraw from, or decline to accept, employment as trial counsel when he, or a lawyer in his firm, ought to be a witness in the cause, unless the testimony will relate only to formal or uncontested matters. Withdrawal or refusal of employment are not required if, in the particular and exceptional circumstances, it would work a substantial hardship on the client because of the distinctive value of the lawyer or the firm as counsel in that particular case.

CANONS, DISCIPLINARY RULES, AND ETHICAL CONSIDERATIONS CITED. Canon 5. Disciplinary Rules 5-101 (B) (1) through (4); 5-102 (A). Ethical Considerations 5-9, 5-10.

This committee continues to receive inquiries as to whether a law firm (or a lawyer) should withdraw as trial counsel when a lawyer in the firm (or the lawyer) ought to testify on behalf of the client. The subject is of sufficient and widespread interest that the committee believes an opinion reviewing the underlying purposes of Disciplinary Rule 5-102(A), and the exceptions to it incorporated from Disciplinary Rule 5-101(B) (1) through (4), will assist lawyers toward a proper resolution of the question when they are confronted with it.

The circumstances which may lead to deciding whether withdrawal is required or whether duty to the client requires the lawyer or firm to continue as advocate despite the necessity for the testimony are, of course, extremely varied. Necessarily the answer in each instance will depend upon the attending facts.

The Code of Professional Responsibility, however, sets forth basic standards and considerations to facilitate resolving the problem properly from an ethical standpoint.

D.R. 5-102(A) provides: "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in D.R. 5-101(B) (1) through (4)."

The four exceptions, from D.R. 5-101(B), permit testimony (1) relating solely to an uncontested matter; (2) relating solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) relating solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; and (4) "as to any matter, if refusal [to continue as trial counsel] would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

Circumstances within exceptions (1) through (3) will usually be easily identifiable and should not present a difficult problem.

It is the sanctioning of the lawyer's testifying "as to any matter," under the conditions described in (4) above, which has generated most of the inquiries to the committee, and the purpose of which perhaps need exposition.

Ethical Considerations 5-9 and 5-10 make clear that the principal ethical objections to a lawyer's testifying for his client as to contested issues are that the client's case will, to that extent, be presented through testimony of an obviously interested witness who is subject to impeachment on that account; and that the advocate is put in the position of arguing his own credibility or that of a lawyer in his firm.

In some situations, the practice may also handicap opposing counsel in challenging the credibility of the lawyer-witness. See E.C. 5-9.

The fact that a witness may be interested, even financially, in the outcome of the case does not necessarily mean that he will testify falsely or will color or slant his testimony to favor the party with whom his interest rests. But given a choice between two or more witnesses competent to testify as to contested issues, and other factors being equal, a client's cause is best served by having the testimony from the witness not subject to impeachment for interest in the outcome of the trial.

Because a trial advocate clearly possesses such an interest, his testimony, or that of a lawyer in his firm, is properly subject to inquiry based on such interest, perhaps including elements of his fee arrangement in some instances. Thus, the weight and credibility of testimony needed by the client may be discounted, and in some cases the effect will be detrimental to the client's cause.

Accordingly, the code generally requires that a lawyer who ought to be a witness for the client should fulfill that function and should not diminish the value of his prospective testimony by also being the client's trial advocate. The client's need for the testimony from a disinterested source and the client's entitlement to an advocate whose effectiveness cannot be impaired because of his advocate having been a witness as to contested issues are the foundation of D.R. 5-102(A) and D.R. 5-102(B).

Despite these considerations, exceptional situations may arise when these

disadvantages to the client would clearly be outweighed by the real hardship to the client of being compelled to retain other counsel in the particular case. For example, where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly unfair to the client to be compelled to seek new trial counsel at substantial additional expense and perhaps to have to seek a delay of the trial. Similarly, a long or extensive professional relationship with a client may have afforded a lawyer or a firm such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer or a lawyer in the firm testify to some disputed and significant issue. By the same criterion, a lawyer having knowledge of misconduct of a juror during the trial of a case is not required to withdraw as counsel in the proceedings in order to testify as to facts of which he has knowledge.

Although not all-inclusive, such situations serve to illustrate the intent of D.R. 5-101(B) (4).[1]

Under the code the critical question is whether the distinctive and particular value to the client of that lawyer or that law firm as trial counsel in that particular case is so great that withdrawal would work a substantial personal or financial hardship upon the client. The most serious and extensive consideration should be given, with the client's informed participation, of the possibility and practicality of engaging other counsel to try the case so that the client may have the lawyer's necessary testimony without the risk of less effective representation resulting from his own counsel being both witness and advocate. If withdrawal, under the circumstances, would clearly work such a hardship on the client, the lawyer or firm should continue as counsel despite the necessity for such testimony.

The lawyer or firm concluding under this standard to continue as counsel should advise the court and opposing counsel immediately that he or a lawyer in his firm intends to testify and the nature of the testimony.

A lawyer may be confronted with the question of whether to *accept* employment as trial counsel when he then knows or it is obvious that he or a lawyer in his firm ought to be called as a witness either in behalf of the client or by an adverse party. The answer to the ethical question is found in D.R. 5-101(B) and is, in general, the same as when the question first arises after representation has been undertaken.

As stated in Ethical Consideration 5-10: "Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. . . ."

In the opinion of the committee, however, a lawyer or firm offered employment when it is known or obvious that he or a lawyer in the firm ought to be called as a witness by an opposing party has critical additional determinations to make. It will be infrequent, if ever, that a lawyer is called by an adversary for testimony within D.R. 5-101(B) (1), (2), or (3). We thus consider the circumstances in which a lawyer may properly accept employment knowing that he or a lawyer in his firm ought to be called as a witness by an adversary or other party for testimony as to other matters.

In the committee's opinion, if it can be anticipated that the lawyer's testimony will be adverse to the client, there will be very few situations in which accepting employment as trial counsel could be justified under the controlling standard of D.R. 5-101(B) (4). Because there are degrees of "adverse" evidence, however, we are not prepared to hold that it would *never* be ethically permissible, but we note that with such employment the lawyer also accepts a heavy responsibility. The most skilled advocate cannot always accurately assess the impact of any testimony upon the trier of facts and the prejudice likely to result from the prospect of unfavorable testimony being elicited from a party's trial advocate must be carefully considered with the client. In this connection, the lawyer must, of course, consider carefully the effect on the client's cause of fulfilling his obligation as a witness to testify truthfully while honoring his correlative duty to maintain inviolate the client's secrets and confidences.

Any doubt about the answer to the ethical question, whether it arises when employment is tendered or after representation has been undertaken, should be resolved in favor of the lawyer's testifying and against his becoming or continuing as counsel. Ethical Consideration 5-10. ▲

1. For a discussion of diverse opinions reached under Canon 19 of the former Canons of Professional Ethics, see Sutton, *The Testifying Advocate*, 41 TEXAS L. REV. 477 (1963).